

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action
	)	No. 13-10200-GAO
	)	
DZHOKHAR A. TSARNAEV, also	)	
known as Jahar Tsarni,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.  
UNITED STATES DISTRICT JUDGE

**SEALED LOBBY CONFERENCE**

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts 02210  
Friday, March 17, 2015  
12:08 p.m.

Marcia G. Patrisso, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
One Courthouse Way, Room 3510  
Boston, Massachusetts 02210  
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Mechanical Steno - Computer-Aided Transcript

## 1 APPEARANCES:

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## 9 UNITED STATES DEPARTMENT OF JUSTICE

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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 12:08 p.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a lobby conference in the case of United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record.

MR. WEINREB: Good afternoon, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Good afternoon, your Honor. Nadine Pellegrini.

MR. BRUCK: Good afternoon, your Honor. David Bruck, Judy Clarke and Tim Watkins for the defendant.

THE COURT: Okay. Let me begin by resolving some of the issues that were discussed the last occasion. The government's motion in limine to preclude reference to the Waltham triple homicide or other alleged bad acts is granted as to the Waltham events. The reason is that there simply is insufficient evidence to describe what participation Tamerlan may have had in those events. I know that the defense has a theory about what those things were, but I don't believe there's any evidence that would permit a neutral finder of fact

1 to conclude that from the evidence.

2 From my review of the evidence, which includes an in  
3 camera review of some Todashev 302s, it is as plausible, which  
4 is not very, that Todashev was the bad guy and Tamerlan was the  
5 minor actor. There's just no way of telling who played what  
6 role, if they played roles. So it simply would be confusing to  
7 the jury and a waste of time, I think, without very -- without  
8 any probative value.

9 As to other bad acts, it will depend. I mean, I see  
00:07 10 on the witness list witnesses who might be able to testify to  
11 behavior of Tamerlan that would be relevant to the defense  
12 theory of domination. So I'm not going to, as a blanket  
13 matter, exclude all bad acts. We'll deal with those issues as  
14 they arise.

15 With respect to the government's motion to preclude  
16 reference to plea negotiations, to the extent the government  
17 presses its non-statutory aggravating factor of absence of  
18 remorse, I think it's fair that the defendant could respond by  
19 showing an offer to plead guilty, but it would then be open to  
00:08 20 the government to explain the conditions that were attached,  
21 including with respect to the sentence and the refusal to  
22 participate in a proffer. If that goes forward, let me just  
23 suggest that the best way to handle that, if the parties wanted  
24 to, would be by stipulation, perhaps.

25 MR. WEINREB: Your Honor, I consider it unlikely the

1 parties will be able to agree on a stipulation of what actually  
2 happened. There was so much back-and-forth over this over  
3 time, plus there are additional documents, draft proffer  
4 agreements, that went back and forth. It's going to be too  
5 complicated. It's going to require witnesses.

6 THE COURT: Well, I didn't say that I thought it was a  
7 likely way of proving it; I said I thought it would be the best  
8 way.

9 With respect to the defendant's motion to exclude the  
00:09 10 testimony of Dr. David King, that's denied, but I do want to  
11 emphasize that he's got to stay on relevant message for this  
12 phase. And so some background to support his testimony is  
13 appropriate, of his experience in Afghanistan and Iraq, but I  
14 don't want it overdone. And I don't think there's any need to  
15 tell the story of the day, which includes his having finished  
16 the marathon and so on. I think he can testify to the medical  
17 evidence without telling the tale of the day and its  
18 particulars.

19 With respect to issues raised in the government's  
00:09 20 omnibus motion with respect to the evidence of -- or argument  
21 about Massachusetts not having a death penalty, the motion in  
22 limine is granted as to that, to exclude that, as well as to  
23 the -- any evidence or argument about the effect on the risk of  
24 future terrorism attacks. That is not, in my view, evidence  
25 about the defendant's personal background or character or about

1 the circumstances of the crime and, therefore, is outside the  
2 scope of mitigation under the law as I regard it.

3 Now, let's get on to the -- so later today, I guess,  
4 we'll get from the defense a response to the motion in limine  
5 and the defense experts which was filed, I think on Monday, and  
6 we set today as the date for response.

7 So you have both now filed witness lists and exhibit  
8 lists. With respect to the issue of how they should be filed,  
9 my inclination is that they be filed in the open docket. I  
00:11 10 mean, they'll soon enough be open to the public. I don't see  
11 why they now need to be under seal.

12 MR. WEINREB: We have no objection to them being filed  
13 on the open docket.

14 MS. CLARKE: We do, your Honor. They're defense  
15 witnesses. We struggled as it is to get people to respond to  
16 us, talk with us and come in with subpoenas, and the press  
17 being all over them is not appropriate. I mean, the Court --

18 THE COURT: I don't know whether that's true, that  
19 it's not appropriate. But let me just say that it's the normal  
00:11 20 course of events.

21 MS. CLARKE: Well, the Court ordered us to provide a  
22 witness list, and no rule requires that, and we think the Court  
23 would be putting our case at great risk by publicizing that  
24 list at this point.

25 THE COURT: Okay. Well, I think it should be public,

1 but I will do this: We will docket it on Tuesday rather  
2 than -- so it doesn't get any press over the weekend.

3 All right. And the same -- I guess I have the same  
4 issue with respect to the mitigating factors. I believe the  
5 government's, at least, statutory factors are probably in the  
6 indictment?

7 MR. WEINREB: That's correct, your Honor.

8 THE COURT: So they're public. I don't think -- are  
9 the non-statutory as well?

00:12 10 MR. WEINREB: They're in the notice of intent.

11 THE COURT: And that's public?

12 MR. WEINREB: That was public.

13 THE COURT: Okay. So there's a new -- there's a, I  
14 guess, substitute list now from the defense of mitigating  
15 factors.

16 MR. BRUCK: Yes, your Honor, there is. Of course,  
17 again, there is no rule or statute that requires us to provide  
18 these prior to the submission of the case to the jury. The  
19 Court, of course, ordered us to provide those, my understanding  
00:13 20 was in fairness to the government's ability to prepare to meet  
21 them. We expect to revise these factors to conform to the  
22 proof, and I may withdraw some. Indeed, we've decided -- we  
23 wish to withdraw one of those on the list right now.

24 This is provisional, in other words, and --

25 THE COURT: Well, at some point Tuesday morning, as a

1 matter of fact, there will be an opening statement. I assume  
2 the defendant will outline the mitigation at that point, or  
3 perhaps after the government's -- maybe -- you can defer your  
4 opening, I guess, until the beginning of your case.

5 MR. BRUCK: We are considering doing that.

6 THE COURT: Okay. But at least at that point -- I  
7 mean, the jury has to know what to listen for.

8 MR. BRUCK: Yes. Yes, we'll make sure they know what  
9 to listen for in our case.

00:14 10 THE COURT: Well, I'd do this: I'll defer until then,  
11 but I think then they ought to be a matter of record. After  
12 all, it would be on the verdict slip.

13 MR. BRUCK: Well, the verdict slip, of course, is --  
14 the jury receives that at the end of the case.

15 THE COURT: Right. But there will be -- in other  
16 words, there will be a specification of propositions that the  
17 jury will be asked to consider.

18 MR. BRUCK: Absolutely.

19 THE COURT: And my only point is I think it makes  
00:14 20 sense just from -- for the jury's purposes that they have some  
21 information about that before the defense evidence begins so  
22 they can listen to the evidence with those things in mind.

23 MR. BRUCK: Well, we did some very brief pleading,  
24 along with the mitigating factors, asking the Court not to  
25 include what would be a very lengthy list of aggravating



1 factors and then a relatively short list of mitigating factors  
2 in the preliminary instructions. The Court obviously has  
3 discretion to do it either way. But thinking about this case,  
4 we think it would be quite unfair and imbalanced to include the  
5 aggravating and mitigating factors in the preliminary  
6 instructions, and the primary reason for that is that the jury  
7 has already had the evidence of the government's aggravating  
8 factors. They're going to add some victim impact testimony,  
9 and that will be new, but by and large everything that is  
00:15 10 alleged in their list of aggravation the jury has already  
11 heard, so it will click with the jury. You will read those  
12 aggravating factors, and they will go, "Got it."

13 Our mitigating case has not been heard except for  
14 little dribs and drabs that we were able to put in to correct  
15 what we thought were misimpressions in the guilt phase. But by  
16 and large, these are mere allegations, and it -- it seems quite  
17 unfair to have the jury start this sentencing process by  
18 hearing proven allegations from one side and unproven  
19 allegations from the other. It has an appearance of symmetry,  
00:16 20 but if you think about it for a moment, there's no symmetry at  
21 all.

22 I understand that Judge Sand's pattern instructions do  
23 provide to include the mitigating and aggravating factors, but  
24 they're not -- it's not essential. It's not a core aspect of  
25 those instructions or any other. Simply to say that the

1 parties will present evidence of mitigation and aggravation and  
2 at the close of the evidence the jury will be instructed on  
3 exactly what those are, the jury didn't have the indictment  
4 read to them before the beginning of the trial. They were just  
5 generally told what the charges were and told to listen to the  
6 evidence, and the specifications were given to them at the end.  
7 We think that's how this ought to be done.

8 MR. WEINREB: Your Honor, we disagree, at least with  
9 respect to the aggravating factors. You proposed --

00:17 10 THE COURT: Just to shortcut it, I'm not sure he's  
11 objecting to that. In other words, let me clarify because that  
12 was a question I was going to ask. Do you object to the  
13 inclusion of the aggravating factors if the mitigating factors  
14 are omitted?

15 MR. BRUCK: Well, that creates a different problem --

16 THE COURT: Right.

17 MR. BRUCK: -- which is also imbalance.

18 THE COURT: Why I put them in there.

19 MR. BRUCK: The aggravating factors are not  
00:17 20 controversial. It's not that the government in this particular  
21 case is really going to be prejudiced in any way, shape or  
22 form. Some of them are built right into the charges of  
23 conviction. And so there's no -- it's not as though the jury  
24 is going to miss the evidence that they need if they haven't  
25 been read a three- or four- or five-page list of aggravating

1 factors. So we just think the Court ought to give the  
2 instructions that provide the framework of what they're about  
3 to hear and get the specifications at the end. So, yes, we  
4 would object to doing it either way.

5 MR. WEINREB: Your Honor, virtually the entire bulk of  
6 the Sand's proposed instruction, which is the one that both  
7 parties have previously agreed could be given pretty much  
8 verbatim, is all about the difference between threshold  
9 aggravating factors, statutory aggravating factors and  
00:18 10 non-statutory aggravating factors, which the government has to  
11 prove in order to go from one to the next and so on. We  
12 absolutely believe the jury needs to be told this, that they  
13 need an explanation of what the penalty phase is all about and  
14 what their job is, what their task is during the penalty phase.

15 Unless threshold aggravating factors are proven, they  
16 don't go on to consider anything else. Unless one of the  
17 statutory aggravating factors is proved, they don't go on to  
18 consider non-statutory aggravating factors. Non-statutory  
19 aggravating factors play a different role, a selection role in  
00:19 20 terms of whether the death penalty -- not eligibility for the  
21 death penalty, but whether it should be given or not. They  
22 absolutely need to know what that sequence of findings they  
23 need to make is, and they need to know which are the threshold  
24 factors, which are the statutory aggravating factors and which  
25 are the non-statutory aggravating factors.

1 I think it is hardly self-evident to them what all of  
2 that is going to be, on the contrary. Even for a lawyer who's  
3 not a death penalty lawyer, it takes a lot of study to  
4 understand the whole framework, and the jury's going to have to  
5 absorb it very rapidly.

6 So we would very much object to the elimination of  
7 that from the instruction, not to mention that the government  
8 will be mentioning all of these factors in its opening  
9 statement anyway, so they're going to hear them whether they  
00:19 10 hear them initially from the Court versus from us; however, we  
11 don't intend to try to supplant the Court and instruct the jury  
12 at length on what the law is. That's not appropriate. It's  
13 not our job. And that runs other risks that we would prefer  
14 not to run.

15 We would vastly prefer that the Court do what it  
16 proposed to do and both parties agreed that it could do, which  
17 is give an instruction that is a tried-and-true instruction and  
18 is the one given in many cases because it is well accepted.

19 As for the mitigating factors, the reading of the  
00:20 20 mitigating factors to the jury, I'd just note that the  
21 government runs the same risk in every case. It's very often  
22 the case that the jury is told what the charges will be, what  
23 the allegations are that the government will seek to prove.  
24 Sometimes it doesn't prove them, and sometimes counts get  
25 struck at the end of a case. Sometimes there's a Rule 29

1 motion; sometimes counts are dismissed. There may be -- in a  
2 conspiracy case, there may be overt acts that are read to the  
3 jury and never proved. So I don't think that that is so great  
4 a risk in a case that creates so great a risk of prejudice that  
5 they need to be withheld from the jury for fear that one or  
6 more of them would be proven.

7 MR. BRUCK: Very briefly, your Honor, I just think the  
8 Court would do best to approach this from a realistic and  
9 common sense point of view. Yes, the verdict forms are  
00:21 10 complicated, but in this case they present no real challenge of  
11 any sort. A jury that worked their way through the verdict  
12 form in this case without being prepped about how many special  
13 findings and special verdicts and guilty verdicts and  
14 sub-verdicts they were going to have to come up with is more  
15 than capable of receiving the detailed instructions at the end  
16 of the case.

17 THE COURT: Okay. I'll think about it.

18 So I guess as I understand it, the government  
19 obviously will open, and the defense has not decided whether it  
00:22 20 will open on Monday or defer until the beginning of its case.

21 MR. BRUCK: That's correct.

22 THE COURT: Let me ask you about foreign witnesses who  
23 may testify by video. Can you tell us who those are?

24 MS. CLARKE: Well, your Honor, we have looked at those  
25 again and decided to not call anyone by video. And we

1 had -- the one witness that's at issue for us right now is  
2 Elmirza. We thought that he was going to be approved for  
3 parole. He was -- he's fluent in English. He's lived in this  
4 country. And we thought he was going to be approved for  
5 parole, and we learned, I think yesterday, he is not. We would  
6 like to ask the Court to intervene and assist with that.

7 But as to the other potential video witnesses, we have  
8 decided not to rely on their testimony. So he's the one at  
9 issue that --

00:23 10 THE COURT: But he might be videoed?

11 MS. CLARKE: Well, we're going to have to figure out  
12 how to video him if we can't figure out how to get him to the  
13 United States.

14 THE COURT: Where is he?

15 MS. CLARKE: He's in Kazakhstan.

16 THE COURT: Just a trivial matter, but I see who he is  
17 from the list.

18 What's the time difference? Do you know offhand?

19 MS. CLARKE: I can't remember.

00:23 20 THE COURT: Eight or nine hours?

21 MS. CLARKE: Seven or eight hours.

22 THE COURT: I was going to guess eight, but okay. As  
23 I say, I'm just curious.

24 MS. CLARKE: It's off of us.

25 But that's the one. And we -- I think we're going to

1 ask the Court to intervene on due process grounds and assist  
2 us, and perhaps the government can assist as well. There was  
3 some discussion that he was going to be approved and at the  
4 last minute was not.

5 THE COURT: Okay. Now, I presume you've each  
6 exchanged the list, the exhibit list and so on and so forth.  
7 Let me -- so does that include the exhibits themselves as well  
8 to the extent they're new exhibits?

9 MS. CLARKE: Yes.

00:24 10 THE COURT: They've been exchanged?

11 MR. CHAKRAVARTY: We haven't looked at them, but we  
12 just did.

13 THE COURT: Okay. Are they in JERS form?

14 MS. CLARKE: I sure hope so.

15 THE CLERK: I got them from the defendant, but I'm  
16 still waiting for the government's.

17 THE COURT: Okay. All right. But you think so?

18 MS. CLARKE: Would you repeat that last statement,  
19 please, that you do have them from the defense but you're  
00:25 20 waiting for the government's?

21 THE COURT: Why? Because it's so odd?

22 (Laughter.)

23 MS. CLARKE: Oh.

24 THE COURT: I don't know if it's that odd, actually.

25 MS. CLARKE: And we were also here early, your Honor.

1 THE COURT: Yes, I noted that, by the way.

2 And with respect to witnesses, I assume this is a  
3 comprehensive list and we don't have to expect 74 defense  
4 witnesses?

5 MS. CLARKE: Yes. And if I could prevail on the Court  
6 again, it really puts us -- our case at great risk by  
7 publication of this list. We were overinclusive, even last  
8 night began to discuss a couple that are not likely witnesses.  
9 And it certainly would be helpful to us not to have this be  
00:25 10 public until we've made some more decisions and provided the  
11 Court with a revised list.

12 We also included in that list a little summary of, you  
13 know, what the relationship to the case was. I mean, that  
14 really is kind of discovery, and we provided it to the Court  
15 out of courtesy to the Court because the Court asked for it,  
16 not so that the --

17 THE COURT: Well, I will agree that in the form that  
18 it is, where it has the commentary, it's different than just a  
19 witness list. I'll agree with that. Of course, I presume all  
00:26 20 these people have been listed on Question A to the  
21 questionnaire? Or Exhibit A and B, I guess, to the  
22 questionnaire?

23 MS. CLARKE: That's so long ago, I hope so.

24 THE COURT: Anyway, all right.

25 MS. CLARKE: So if we could ask the Court to at least



1 reconsider that or delay production until we can at least trim  
2 it slightly more so that we don't put people who may not be  
3 witnesses -- expose them to the public.

4 THE COURT: Okay. Let me just ask the government, I'm  
5 not entirely clear what the objective is with respect to the  
6 victim witnesses, and I think the parties have some  
7 understanding about limits, but I'm not sure they have the same  
8 understanding. And so I just want to vet that a little bit.

9 First, for some of these people, I guess, they've  
00:27 10 already testified. Karen McWatters, for example, has already  
11 testified. I guess -- I presume she's not going to just repeat  
12 what she's already said, so what is it that you would offer  
13 through somebody like her?

14 MS. PELLEGRINI: Your Honor, with respect to  
15 Ms. McWatters, I know the little explanation there includes  
16 everything that she previously testified to. I think that the  
17 only thing that she would be testifying to is the inclusion of  
18 the true impact of Krystle's death as a friend and as a  
19 coworker, and following her death.

00:28 20 THE COURT: I see. Okay. So is that true of others  
21 who have --

22 MS. PELLEGRINI: Yeah, that would be true -- if  
23 Danling Zhou, for example, testifies, it would no longer be  
24 about her and her injury or about necessarily that day, but it  
25 would be about the loss and what it means to the family and

1 friends. That's on victim impact.

2 THE COURT: Okay.

3 MR. WEINREB: Your Honor, it may be useful for the  
4 Court to note Lingzi Lu's parents are in China and not  
5 intending to come back over here for this for a variety of  
6 personal reasons, so the government is trying to find other  
7 ways to put on testimony about the -- about who Lingzi was and  
8 about the impact of her loss on the family and the community of  
9 which she was a part. So all of the witnesses who are listed  
00:29 10 on our list as victim impact witnesses, that only has to do  
11 with the impact of the loss of decedents.

12 THE COURT: Okay.

13 MR. WEINREB: With respect to witnesses who are listed  
14 for grave risk of death, we won't be calling all of them, so --  
15 we'll only be calling a few who I think -- who we believe their  
16 injuries highlight and -- that are extremely probative with  
17 respect to that factor, that the offense created grave risk of  
18 death to others besides the decedents.

19 THE COURT: Okay. Well, that responds to one of my  
00:29 20 concerns which was cumulateness.

21 Okay. I think that covers mostly what I had in mind.  
22 How long will the opening be? Who's giving the opening?

23 MS. PELLEGRINI: I am, your Honor. Approximately 30  
24 minutes.

25 THE COURT: Thirty minutes?

1 MS. PELLEGRINI: Thirty minutes.

2 THE COURT: Can I just stay on the schedule for a  
3 minute? So there's been some suggestion from the government  
4 that you thought the case might be two, three days, something  
5 like that?

6 MR. WEINREB: Our case-in-chief, yes.

7 THE COURT: So you'll probably finish before -- I told  
8 the jury they'll have to be here on Friday, but they may well  
9 not.

00:30 10 MS. PELLEGRINI: It's possible; however, a few of our  
11 witnesses simply can't testify until Thursday so --

12 THE COURT: We could have shorter days, I guess. But  
13 the defense won't have to start until Monday, just so we have a  
14 predictable place to start. And I just want to run off the  
15 top, who's opening for --

16 MR. BRUCK: I am, your Honor.

17 THE COURT: Do you have an estimate yet?

18 MR. BRUCK: It will be more than 30 minutes. I think  
19 more like an hour, most likely.

00:31 20 The --

21 THE COURT: Okay. I wanted to go back to recognizing  
22 Mr. Weinreb who was next in line, if you're going to change the  
23 topic.

24 MR. WEINREB: Thank you, your Honor.

25 So there are just a few -- so we just got the defense

1 exhibit list, and as we predicted earlier, there is certainly  
2 going to be items on which we want to move in limine. We don't  
3 have -- and it may also be true, frankly, with respect to some  
4 of the witnesses. For example -- it's a little hard for us to  
5 determine. There are four witnesses listed, for example, among  
6 the EMT personnel who transported Tamerlan Tsarnaev to the  
7 hospital. Even assuming any of them are offering testimony  
8 relevant to the defendant's character, of the circumstances of  
9 his offense or his history, it's hard to see why four would be  
00:31 10 needed. I assume they're all on there because the defense  
11 hasn't decided yet which one to call, but perhaps by conversing  
12 with them we'll be able to narrow down the scope of what we  
13 need to do here.

14 But there are a few things that jumped out at us, and  
15 it might be useful to voice them now to avoid some things down  
16 the road. There was a -- the government filed a motion in  
17 limine with respect to Dr. -- I don't know if it's "Giedd" or  
18 "Giedd."

19 MS. CLARKE: Giedd.

00:32 20 THE COURT: Giedd.

21 MR. WEINREB: And if the Court allows that testimony,  
22 then the government's going to be seeking an order to obtain  
23 films of CT scans that were taken of the defendant when he was  
24 at Beth Israel Hospital. We've previously obtained all of the  
25 defendant's medical records, but Beth Israel is quite concerned

1 that it not exceed the scope of anything that it has previously  
2 been ordered to do, and it deems these films to be not a  
3 medical record but some other protected healthcare information.  
4 So I just wanted the Court to know that's coming.

5 THE COURT: Okay.

6 MR. WEINREB: And with respect to the exhibits that  
7 the government seeks to move in limine, we were concerned that  
8 some of them were ones that the defense might want to mention  
9 in their opening statements and that that would demand a quick  
00:33 10 ruling, but since -- I guess that will depend in part now on  
11 whether the defense is opening on Monday or the following -- on  
12 Tuesday or the following Monday.

13 THE COURT: Right.

14 MR. WEINREB: So I don't know how quickly we need to  
15 get that matter resolved.

16 THE COURT: Well, in the usual course we need to get  
17 it resolved before the opening.

18 MR. WEINREB: Yeah. So I mean, we'll -- so we'll just  
19 let you know. Today's Friday. You know, it's a weekend, a  
00:34 20 holiday, and then Tuesday. So we'll file something with the  
21 Court over the weekend in the fashion we've been doing  
22 previously, and we'll let the defense have it as soon as it's  
23 ready.

24 THE COURT: Perhaps you can get a better answer in a  
25 day or so from the defense as to what their plans are.

1 MR. WEINREB: We'll --

2 THE COURT: That would be nice.

3 MR. WEINREB: Yeah, that would be helpful.

4 THE COURT: I'll invoke the nice rule.

5 MR. WEINREB: In addition, we will have a motion to  
6 strike some of the mitigators. Just to give a preview,  
7 primarily we're looking at the range of 11 through 15, the ones  
8 at the end which -- except for 12. To the extent that 12  
9 relates to the defendant's character, meaning his propensity  
00:34 10 for future violence based on things that people may have to say  
11 about him or have observed about him in the past or anything  
12 related to that, then we wouldn't have an objection to it, but  
13 to the extent that it deals with the capacity of the Bureau of  
14 Prisons to incapacitate people in general, we would have an  
15 objection to it as being not a proper mitigator.

16 And then we believe the same is true with respect to  
17 11, 12 -- I'm sorry -- 11, 13, 14 and 15. In our view, none of  
18 those relate to the defendant's character, criminal history or  
19 the circumstances of the offense, but largely relate to  
00:35 20 general, more policy arguments. So --

21 THE COURT: Okay.

22 MR. WEINREB: -- that again we thought would be  
23 something that would need to be resolved before the --

24 THE COURT: Now, of course, it will depend on whether  
25 they get mentioned at that point or not.

1 MR. WEINREB: Well, they would be mentioned in opening  
2 statement.

3 THE COURT: In the opening, right.

4 MR. WEINREB: But -- or in the Court's --

5 THE COURT: Well, the earliest point would be if I put  
6 it in the preliminary instructions because that would be  
7 Tuesday. It might be as late as next Monday if it was an issue  
8 about the opening.

9 MR. WEINREB: Right.

00:36 10 (Counsel confer off the record.)

11 MR. WEINREB: One -- there's...

12 (Counsel confer off the record.)

13 MR. WEINREB: One of the exhibits that the defense put  
14 on its list is a note that the -- I think it was Mr. Bruck  
15 mentioned in our last hearing. This was something that the  
16 defendant wrote and presented to the government through his  
17 attorneys. We regard that as an unsworn allocution by the  
18 defendant. We had understood the defense to say that they were  
19 not going to be offering any unsworn allocution evidence, and  
00:37 20 so that's something that I believe -- that's the kind of bell  
21 that can't be unrung once the jury's heard it. So that's  
22 something that we think --

23 First of all, we're confused about whether we now need  
24 to renew our motion with the Court to bar unsworn allocution  
25 testimony when the defense already seemed to have conceded that

1 they weren't going to do that, and if not, then have some kind  
2 of clear understanding among the parties that that's not going  
3 to be mentioned or offered.

4 THE COURT: Okay. Mr. Bruck, you had something?

5 MR. BRUCK: Well, to respond to those matters, I  
6 should -- I can make things a little simpler for Mr. Weinreb by  
7 advising that we intend to withdraw, or at least not to allege,  
8 at least at this point, Number 13 on our list of mitigating  
9 factors. As far as the -- and I should say generally that the  
00:38 10 matters that Mr. Weinreb is objecting to are certainly  
11 litigated in the vast majority of federal capital cases. It  
12 would -- I suppose we'll have to brief the issue, but this is  
13 not -- these are not unusual or uncommon facts to be litigated  
14 at a sentencing hearing.

15 In fact, as to Number 11, I think the Court will note  
16 in Judge Sand's treatise that he actually recommends that with  
17 respect to Number 11, that the Court issue a peremptory  
18 instruction directing the jury to find that as a fact rather  
19 than allow that to be something that the jurors think they can  
00:39 20 either find or not, depending.

21 I just mention that as some indication of the fact  
22 that these factors, whether they concern the defendant  
23 personally or not, are very commonly litigated. And in that  
24 connection, I just should mention that this is an area that the  
25 Supreme Court really has spoken in, and in the case of *Simmons*



1 v. *South Carolina*, which is the case that said that the  
2 defendant is entitled to show that he's not eligible for parole  
3 if he gets a life sentence. It's an example of how the court  
4 has taken a common sense approach to this rather than a rigid  
5 doctrinaire and limiting approach to the issues that are  
6 relevant to the jury. I realize this should probably await  
7 full briefing, but I did want to respond to that -- so much of  
8 the argument that Mr. Weinreb just made.

9 As far as the note that the defendant wrote, it gets  
00:40 10 complicated because there was an expression of remorse that he  
11 submitted in connection with plea negotiations. And I suppose  
12 one could view that as somewhat closer to -- well, it's not  
13 allocution, but a statement. The statement that he submitted,  
14 or that we submitted on his behalf, that is in the evidence  
15 list is not that; it is an offer to the government to use a  
16 statement as a way of counteracting propaganda that had -- that  
17 was exploiting -- jihadi propaganda that that was exploiting  
18 the Boston Marathon bombing. And so it's one of those things  
19 that is not -- was not made sort of for the truth of the matter  
00:41 20 asserted, but rather as a statement that the government could  
21 use, if it wished to do so, in furtherance of counterterrorism  
22 programming policy.

23 Be all that as it may, whether we make the opening  
24 statement next week or the week after that, we're not going to  
25 mention it in the opening, so there's no pressing decision on

1 that one way or the other.

2 One matter we had to raise with respect to victim  
3 impact testimony, of course we've already argued and the Court  
4 has heard the reasons why we don't think that the actual  
5 injuries to people within the zone of danger is what is  
6 encompassed by the grave-risk-of-death aggravator. So we think  
7 that all of it is key, but the issue is whether there were  
8 people within the zone of danger that -- not actually the  
9 horrific details of some of the injuries that were caused.

00:42 10 The one other matter is that the father of Lingzi Lu  
11 has a videotaped elegy memorial talk that he gave at a very  
12 large public gathering at BU before an enormous audience  
13 shortly after her death, and we think it inappropriate to play  
14 so public a videotape as opposed to simply introducing the  
15 statement that he made. It reflects, you know, the feelings  
16 and emotions, or at least the honor being accorded to this  
17 young lady and to her father by a very large group of people  
18 who are not part of this case and should not be part of the  
19 jury's considerations.

00:43 20 It is tearful, not inappropriately so considering what  
21 it was. But since it is on video and the Court can control for  
22 displays of emotion by other means, and because this is at a  
23 very large public gathering which injects the issue of public  
24 opinion into the judicial proceeding and lets the jury know the  
25 presence of hundreds, thousands of people who are -- who were

1     grieving along with this man and are going to perhaps have  
2     reactions to their verdict, we think it better to simply submit  
3     the statement.

4             The statement itself also includes a poem that  
5     Ms. Lu's father described as having been published by a  
6     newspaper in his hometown in China. It doesn't tell who the  
7     author is. It's basically offered as sort of a public  
8     expression from China of emotion and sorrow. And it seems that  
9     that once-removed public expression should not enter into these  
00:44 10     proceedings.

11             So for all those reasons, we think the statement  
12     should be edited and should be read to the jury rather than  
13     played as a videotape from a public forum.

14             MR. WEINREB: I can respond briefly just to two  
15     things. On that last point, the government disagrees that a  
16     transcript is any substitute for seeing the actual statement of  
17     Mr. Lu. First of all, he's -- for the jury to know what weight  
18     to assign his expressions of concern or his statements about  
19     his daughter, they need to see his demeanor and his  
00:45 20     presentation and how he speaks. He's not overly emotional, and  
21     among other things, he's speaking in Chinese. So the  
22     government has -- there was a -- he gave the speech entirely in  
23     Chinese. It was followed by a translation that was given by  
24     somebody at BU who is fluent in both languages who spoke  
25     without any tears or any emotion. And we have essentially

1 overlaid the translation as if -- over the image of the father  
2 speaking. So --

3 THE COURT: The audio of the translation over the  
4 video of the father?

5 MR. WEINREB: Correct. Although it's true -- for the  
6 most part the video remains a close-up of his face. From time  
7 to time it pulls back and shows a portion of the crowd, and  
8 then sometimes an even larger portion of the crowd. To the  
9 extent that it shows a portion of the audience, we believe that  
00:46 10 it's not the least bit prejudicial. When people die, there are  
11 funerals, and everybody knows that they're attended by a number  
12 of people. There's no reason to pretend that nobody besides  
13 Mr. Lu was affected by the death of his daughter; and, in fact,  
14 the entire community at Boston University was affected, and  
15 there's no reason why the jury shouldn't know that. That was  
16 part of the loss that was experienced by the community as a  
17 result of her death.

18 To the extent that any portion of it -- that some  
19 shots are so wide or taken of so many people that it could be  
00:46 20 said that there is a prejudicial impact that outweighs the  
21 probative value of the evidence, then the government can  
22 always -- we can always cut to a still shot of Lingzi Lu,  
23 substitute that for the video portion, just for those few  
24 seconds when the shot is that wide. But we really don't think  
25 it's necessary at all.

1 THE COURT: How long is it?

2 MR. WEINREB: It's about ten minutes?

3 MR. CHAKRAVARTY: Ten minutes.

4 MR. WEINREB: Ten minutes.

5 THE COURT: Okay. The best way to resolve it is for  
6 me to look at it, I guess.

7 MR. WEINREB: Yes. And it's on the --

8 MS. PELLEGRINI: It should be on the disk.

9 MR. CHAKRAVARTY: Your Honor, it's on the disk. And I  
00:47 10 don't know why we didn't have a copy when we came down, when we  
11 gave it. So right after this hearing we'll get another copy.

12 THE COURT: Okay.

13 MR. WEINREB: And then the only thing I would add,  
14 since Mr. Bruck discussed it at some length, with respect to  
15 Mitigating Factor No. 11, the only reason we cited that as an  
16 improper mitigating factor is precisely because it's a matter  
17 that the judge should instruct the jury; it's not a matter for  
18 them to determine whether it exists by the preponderance of the  
19 evidence.

00:47 20 THE COURT: Okay. I think that's it.

21 MR. CHAKRAVARTY: Your Honor, just to clarify so I  
22 understand, in terms of -- there's some exhibits that we would  
23 have some of these concerns that Mr. Weinreb articulated  
24 earlier that we would file something over the weekend on. That  
25 may result in the defense, if they want to modify their witness

1 and exhibit lists before they're made public, of actually  
2 removing some of these exhibits and witnesses from the -- I  
3 just wanted to both alert the Court that there are some  
4 exhibits as well as some of the witnesses that they noticed  
5 that the government has concerns about.

6 THE COURT: Okay. All right. Very good.

7 MS. CLARKE: One final thing while we have you.

8 THE COURT: All right.

9 MS. CLARKE: We've written to the government about  
00:48 10 what I'll call *Jencks* for defense witnesses. If they testified  
11 in front of the grand jury or they have a videotaped statement  
12 or some kind of statement that they've adopted, we've asked the  
13 government to produce that to us, and we've heard no response,  
14 and I wonder if the Court would encourage that.

15 MR. WEINREB: We'll provide a response.

16 THE COURT: When?

17 MR. WEINREB: We'll provide a response later today.

18 THE COURT: Is it clear who the witnesses are? I  
19 mean, can you -- I know the long list. I mean, do you have  
00:49 20 some that you think you're particularly interested in?

21 MS. CLARKE: Yes.

22 THE COURT: I mean, it would be easier if you narrowed  
23 the list down.

24 MS. CLARKE: We don't know who testified in front of  
25 the grand jury, and that's what we've asked for. And some

1 witnesses, they've said they were tape-recorded, videotaped,  
2 and we haven't seen those. So we thought the government would  
3 know from the list of witnesses. We can tell them in greater  
4 detail if that will help.

5 MR. WEINREB: Just so we're clear, your Honor, this  
6 isn't a request for *Jencks* material.

7 THE COURT: Right.

8 MR. WEINREB: This is a request for information that  
9 is not *Jencks*, is not discoverable under Rule 16, is not *Brady*  
00:50 10 material. It is simply not discoverable at all.

11 MS. CLARKE: Well, it's part of statements by these  
12 witnesses, and we're calling them in our case in mitigation,  
13 and we believe they have favorable mitigating things to say.

14 MR. WEINREB: And to the extent that they do, that  
15 those statements were disclosed long, long ago, and there was  
16 much litigation over whether the defense was entitled to  
17 verbatim copies of it or they were simply entitled to a fair  
18 and accurate statement of what the witnesses had said. That  
19 was litigated and decided, relitigated and redecided, and  
00:50 20 there's no reason to go yet another round.

21 MS. CLARKE: I think we've gotten our response.

22 THE COURT: Okay.

23 MR. CHAKRAVARTY: Your Honor, as long as that's an  
24 issue, we have made the reciprocal request and haven't received  
25 anything with regards to prior statements of defense witnesses.

1 MS. CLARKE: I can tell them that we called no one in  
2 front of the grand jury.

3 THE COURT: Okay. All right. We'll see you on  
4 Tuesday.

5 THE CLERK: All rise for the Court.

6 (The Court exits the courtroom and the proceedings  
7 concluded at 12:53 p.m.)

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## C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200, United States v. Dzhokhar Tsarnaev.

/s/ Marcia G. Patrisso  
MARCIA G. PATRISSE, RMR, CRR  
Official Court Reporter

Date: 4/21/15